IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARTFORD FIRE INSURANCE COMPANY, Plaintiff	:	CIVIL ACTION
v.	:	
WSR CORPORATION and SEAGULL, LLC, Defendants	:	NO. 99-6120

Newcomer, S.J. July , 2000

M E M O R A N D U M

Presently before this Court are plaintiff's Motion for Summary Judgment, defendants' Motion for Summary Judgment, as well as Responses and Reply briefs thereto. For the reasons set forth below, this Court grants plaintiffs' Motion for Summary Judgment, denies defendants' Motion for Summary Judgment, and enters judgment for plaintiff.

I. BACKGROUND

The instant declaratory judgment action was brought by Plaintiff Hartford Fire Insurance Company ("Hartford") to construe its rights and responsibilities under a multi-premises policy of insurance ("Hartford Policy"), issued to Defendant WSR Corporation and Seagull, LLC ("WSR"), as it relates to WSR's claims for coverage under the policy for flood damage occurring to its premises at 919 N. Springfield, Darby, PA on or about September 16, 1999.

WSR is a New Jersey corporation that owns and operates 93 discount auto stores, including warehouses and offices, at various locations on the Northeast Atlantic Seaboard. WSR was

insured by the St. Paul Insurance Company when its then-existing policy needed to be renewed in the fall of 1997. At that time, WSR contracted the Kaye Corporation of Connecticut ("Kaye"), as its producer/broker, and Insurance Consulting Associates ("ICA"), as an independent consultant, to help assess WSR's insurance needs. During the negotiations for the policy in dispute, ICA acted as a liaison between WSR and Kaye, while Kaye acted as a liaison between ICA, WSR, and Hartford.

Kaye informed WSR that a renewal of the St. Paul policy would include a substantial premium increase, but that Hartford could offer a policy with a lower premium. WSR decided to purchase a policy from Hartford. On September 30, 1997, Kaye drafted and forwarded to Hartford a proposed binder of coverage for WSR. Hartford accepted the binder on September 30, 1997. The binder indicated the policy would be effective October 1, 1997 through October 1, 1998 for a loss limit of $25,000,000. The binder also indicated a $10,000,000 sublimit for flood losses as follows:

Sublimits:
$10,000,000 Flood (excluding Zone A & B)

When the policy was completed, the flood schedule also included the following statement: "Excluded Premises: ALL LOCATIONS DESIGNATED IN FLOOD ZONE A OR FLOOD ZONE B" (emphasis in original).

The Federal Emergency Management Agency ("FEMA") developed the classification of properties within flood zones.

In order to provide a basis for government and private insurers' risk calculations, the Flood Insurance Rate Maps ("FIRM") classify land areas within the 67 official flood zones. Both Zone A and Zone AE are classified as areas of "special" flood hazards (as opposed to "moderate" or "minimal" flood hazards). Zone A is distinguished from Zone AE - Zone AE has water surface elevations determined whereas Zone A does not have water surface elevations determined. 44 C.F.R. § 59.1. FIRM defines Zone A as an "[a]rea of special flood hazard without water surface elevations determined." 44 C.F.R. § 64.3(a)(1). Zone B is defined as an "[a]rea of moderate flood hazards," while Zone C is an "[a]rea of minimal hazards." Id.

On October 31, 1997, a conversation between representatives of WSR, Kaye, and ICA revealed that zone determinations had been made, and that the only Zone A location was the Pompton Plains, New Jersey store. Based on that information, on November 3, 1997, Kaye obtained a FEMA Standard Flood Determination and Notice of Special Flood Hazards from CIGNA Flood Services. CIGNA reported that the Pompton Plains location was in fact in flood Zone AE. On November 4, 1997, Kaye sent ICA notice of FEMA's determination.

On November 4, 1997, Hartford also learned through its own standard flood hazard determination that the Pompton Plains location was in Flood Zone AE. On November 3, 1997, Kelly Charkales of Kaye had sent a fax to Jennifer Russo of Hartford requesting information on the Pompton Plains location.

Subsequently, Hartford responded by fax stating that the Pompton Plains location was in "Flood Zone A" and was not covered by the policy.

In October of 1998, the Hartford Policy was renewed for another year without any pertinent change in terms. Before the expiration of that renewed policy, on September 16, 1999, the Darby, Pennsylvania store, at issue here, suffered flood damage. It is undisputed that the Darby store was located in flood zone AE. WSR presented a claim to Hartford under policy no. 10 MSP LG1497, which was in effect between October 1, 1998 and October 1, 1999 for coverage of the flood damage suffered at the Darby store. On October 6, 1999, Kaye expressed the need to determine the flood zones for the insured locations, because the policy excluded Zones A and B.

Hartford has filed a Motion for Summary Judgment asserting that the flood damage suffered by defendant at its Darby store is subject to an exclusion in its special property insurance policy. Plaintiff also asserts that it did not owe Defendants a fiduciary duty relating to the underwriting or sale of the policy.

Defendant WSR has filed its Motion for Summary Judgment asserting that its Darby store is not subject to an exclusion in its special property insurance and that plaintiff owed WSR a fiduciary duty relating to the underwriting or sale of the policy.

II. SUMMARY JUDGMENT STANDARD

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Common, 826 F.Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of

affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. DISCUSSION

A. PENNSYLVANIA LAW APPLIES TO THIS ACTION

Since this case was filed in Pennsylvania, the choice of law rules of Pennsylvania shall apply. Klaxon Company v. Stentor Electrical Manufacturing Company, Inc. 313 U.S. 487, 496 (1941). For insurance contracts, the court “must apply the law of the state having the most significant contacts or relationships with the particular issue. . . . The weight of the particular state's contacts must be measured on a qualitative rather than quantitative scale.” Caputo v. Allstate Insurance Company 344 Pa.Super. 1, 5-6, 495 A.2d 959, 961 (1985). The state where property is located has a more compelling interest in what happens to the property because the location of the property will have at least some effect on the cost of insurance. Miller

v. S.T. Good Insurance, Inc. 952 F.Supp. 238, 241 (E.D.Pa. 1997). Although Hartford's home offices are in Connecticut, Kaye is located in Connecticut, and WSR is incorporated in Delaware, the two states with the most contacts are New Jersey and Pennsylvania. And while WSR's home offices are in New Jersey, the policy was delivered to WSR's New Jersey address, and some negotiations regarding the policy occurred in New Jersey, the premises are located in Pennsylvania, and the state has an interest in flood classifications' effect on insurance. Therefore, this Court finds that Pennsylvania's interests in this action are more compelling, and that Pennsylvania law should apply.

B. INTERPRETATION OF THE CONTRACT

The task of interpreting an insurance contract is to be performed by the Court. Standard Venetian Blind Co. v. Am. Empire Ins. Co., 500 Pa. 300, 305, 469 A.2d 563, 566 (1983). The goal of that task is to ascertain the intent of the parties as manifested by the language of the written instrument. Id. Exclusions in insurance policies are strictly construed. First Pa. Bank, N.A. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 397 Pa. Super. 612, 618; 580 A.2d 799, 802 (1990). Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer. Standard Venetian Blind, 469 A.2d at 566. However, where the language is clear and unambiguous, the court is required to give effect to that language. Id.

1. AMBIGUITIES IN THE EXCLUSION CLAUSE

The Third Circuit, applying Pennsylvania law, held that an insurance policy provision is ambiguous if it "is reasonably susceptible to more than one interpretation." The Medical Protective Company v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). Ambiguity only exists where a policy provision is reasonably susceptible of more than one meaning, not where the parties differ on meaning. Tenos v. State Farm Ins. Co., 716 A.2d 626, 629 (Pa. Super. Ct. 1998).

In the instant case, the plain meaning of the exclusion clause of the Hartford Policy indicates that Zones A and B were excluded from the policy. Zone A, however, is defined differently than Zone AE, since the water surface elevations are determined in Zone AE, whereas in Zone A they are not. Thus, a reasonable interpretation of the exclusion clause would conclude that Zone A was excluded from the policy while Zone AE was not, because the determination of the water surface elevations in zone AE create different rates for insurance. This interpretation is also reasonable since the parties were aware of the differing classifications between Zones A and AE.

However, both Zones A and Zone AE are described as areas of "special" flood hazard, while Zone B is a "moderate" flood hazard. Since Zone A and Zone B were excluded by the policy, it is reasonable to conclude from the policy language that Hartford meant to exclude all areas of special and moderate flood hazard. Therefore, the Court finds that the

interpretations offered by both parties are reasonable, and thus renders the policy language ambiguous.

2. NO NEED TO CONSTRUE AMBIGUITY IN FAVOR OF HARTFORD

Generally, "[t]he rule of construction is that where there is ambiguity in an insurance policy, such ambiguity should be construed in favor of the insured and against the drafter of the policy." Contrans, Inc. v. Ryder Truck Rental, Inc, 836 F.2d 163, 168 (3d. Cir. 1988). The justification for construing ambiguities in insurance contracts against the insurer is twofold. First, insurance policies are usually "contracts of adhesion between two parties not equally situated and thus equity requires their interpretation in favor of the weaker party." The Medical Protective Company v. Watkins 198 F.3d 100, 104 (3d Cir. 1999). Second, the insurer is considered an expert in its field "and its varied and complex instruments are prepared by it unilaterally whereas the assured . . . is a layperson unversed in insurance provisions and practices." Id. Where the insured is a large company, the rule's justification that the parties do not have equal bargaining power, and therefore should have any ambiguities in the contract construed in their favor, is less convincing. See Brokers Title Co. Inc. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1179 (3d Cir. 1979), Eastern Associated Coal Corp. v. AETNA Casualty & Surety Company, 632 F.2d 1068, 1075 (3d Cir. 1980).

Under Pennsylvania law, an "insurer's failure to

utilize more distinct language which is available reinforces a conclusion of ambiguity." The Medical Protective Company v. Watkins, 198 F.3d 100, 105 (3d Cir. 1999). Since the insurance company usually creates the language which supports two conflicting interpretations, they cannot complain when the person affected chooses the interpretation that favors them. See id. In the present case, however, this rationale is not convincing since Kaye drafted the original binder, and the wording regarding the exclusion of flood zones was not changed in the final insurance policy. Therefore, the ambiguity was not created by Hartford, but rather by WSR, or at least by its agents.[1] Thus, there is no justification to construe the ambiguities against the insurer Hartford and in favor of the insured WSR.

3. PAROL EVIDENCE INDICATES THE PARTIES UNDERSTOOD ZONE AE WAS EXCLUDED FROM THE POLICY

Where an ambiguity exists, parole evidence is admissible to explain, clarify or resolve the ambiguity. See Hutchison v. Sunbeam Coal Corporation, 513 Pa. 192, 200, 519 A.2d 385, 390 (1986). In the instant case, although Michael LoStocco, an insurance program manager at a division of the Kaye Group known as Program Brokerage Corporation, stated in his deposition that he had seen policies which specifically excluded Flood Zone

[1]WSR was aware of the problem with zone classification, because a representative of WSR was at the October 31, 1997 meeting where flood zone determinations were discussed. Therefore, although Kaye drafted the agreement, by the time of renewal, WSR was aware of the limitations.

AE, the evidence shows that both parties understood that Flood Zone AE was encompassed in Flood Zone A, or at least was excluded by the Hartford Policy. For instance, by pursuing additional flood insurance coverage for the Pompton Plains store, it is evident that WSR, or at least its agents, considered Flood Zone AE to be excluded from coverage.[2]

Upon consideration of the Hartford Policy and the parol evidence, the Court finds that the policy was intended to exclude Flood Zone AE from insurance coverage and that the parties understood that Flood Zone AE was excluded.

C. BREACH OF FIDUCIARY DUTY

WSR claims that plaintiff should be estopped from denying coverage since plaintiff breached its fiduciary duty by failing to perform a determination of whether any of WSR's properties were within excluded flood zones, and then failed to advise WSR of the same.

It has been held that there is "no justification in the law to impose the additional burden on insurers that they anticipate and then counsel their insured on the hypothetical, collateral consequences of the coverage chosen by the insured. The basic contractual nature of insurance coverage . . . requires fair dealing and good faith on the part of the insurer, not hand holding and substituted judgment." Treski v. Kemper National

[2]Although WSR claims that Hartford was already bound by the policy before the discrepancy was discovered, the Court will not consider this argument, because no changes were made regarding this issue when the policy was renewed.

Insurance Companies, 674 A.2d 1106, 1114 (Pa.Super. 1996). In addition, recovery based on an estoppel theory will be denied where both parties are equally familiar with the underlying facts of their relationship. See Provident Mutual Life Insurance Company of Philadelphia v. Ehrlich, 508 F.2d 129, 135 (C.A.Pa. 1975).

Here, while the insurance policy (or contract) between Hartford and WSR stated that exclusions existed, there were no provisions that Hartford would inform WSR which locations were subject to the exclusion. As WSR had employed Kaye and ICA to assist them in securing insurance, there is no reason to believe that Hartford had any advantage over WSR. Absent evidence that Hartford misled WSR, or its agents, during negotiations for the policy, there is no duty or liability imposed on Hartford for the loss sustained at the Darby store. In the instant case, no such evidence has been produced. Accordingly, WSR's argument for breach of fiduciary duty fails.

An appropriate order will follow.

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Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this day of July, 2000, upon consideration of plaintiffs Motion for Summary Judgment, defendant's Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED as follows:

(1) Defendant's Motion for Summary Judgment is DENIED.

(2) Plaintiff's Motion for Summary Judgement is GRANTED.

(3) JUDGMENT is ENTERED for PLAINTIFF.

(4) All outstanding motions are denied as moot, judgment having already been entered.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.